STATE OF MICHIGAN

COURT OF APPEALS

TAYLOR COMMONS, Plaintiff-Appellant,	UNPUBLISHED May 21, 1999
v	No. 206653 Wayne Circuit Court
CITY OF TAYLOR and COUNTY OF WAYNE, Defendants-Appellees.	LC No. 96-635327 AW

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). We reverse and remand.

In an earlier action before the Michigan Tax Tribunal between plaintiff as petitioner and defendants as respondent, plaintiff challenged defendants' 1992 ad valorem property tax assessment of plaintiff's shopping center known as Taylor Commons. *Taylor Commons v City of Taylor and County of Wayne*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 1996 (Docket No. 182833) ("*Taylor I*"). As part of its challenge, plaintiff contended that the act was unconstitutional and asked the tribunal to formulate its property assessment by applying the Constitution's uniformity provision, Const 1963, art 9, § 3, rather than 1991 PA 15 (the "tax-freeze" act). *Id.* The tribunal found that it did not have jurisdiction to decide the constitutional issue, further found that defendants properly applied the act and granted summary disposition in defendants' favor. *Id.* This Court affirmed the tribunal's grant of summary disposition, agreed with the tribunal's jurisdictional determination, and concluded that the tribunal could not apply the uniformity provision in place of the act.[1] *Id.* As part of its appeal, plaintiff asked this Court to apply the constitutional requirements for uniformity of taxation even if we determined that the tribunal did not have jurisdiction to apply the constitutional requirements. *Id.* However, we decided the case on non-constitutional grounds and declined to apply the constitutional requirements. *Id.* Nonetheless, we stated that if we were to address plaintiff's argument, "we would conclude that the act is constitutional." *Id.*

After we affirmed the tribunal's decision in *Taylor I*, plaintiff filed the present suit in circuit court for a judgment declaring Section 10 of the act, codified as MCL 211.10; MSA 7.10, unconstitutional

and issuance of a writ of mandamus compelling defendants to change the 1992 assessment on the subject property to the amount of the 1991 assessment ("*Taylor II*").[2] The trial court granted defendants' motion for summary disposition in *Taylor II* on res judicata grounds, holding that this Court had decided the constitutionality of the act on the merits in *Taylor I*. Plaintiff contends that res judicata cannot apply because this Court's discussion of the act's constitutionality in *Taylor I* was dictum. We agree.

The doctrine of res judicata prevents the relitigation of facts and law between the same parties. *Socialist Workers Party v Secretary of State*, 412 Mich 571, 583; 317 NW2d 1 (1982). Whether res judicata applies is a legal question that this Court reviews de novo. *Bergeron v Busch*, 228 Mich App 618, 620; 579 NW2d 124 (1998). Three elements must be satisfied in order for an action to bar a subsequent action under the doctrine of res judicata: "(1) the prior action was decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involved the same parties or their privies." *Bergeron, supra,* at 621. In the present case, res judicata will not apply unless we conclude that this Court decided the constitutional issue on the merits in *Taylor I*.

We agree with plaintiff's contention that our discussion regarding the constitutionality of the act in *Taylor I* was obiter dictum. In *Taylor I*, we affirmed the tribunal's decision on non-constitutional grounds and resolved the case without addressing the act's constitutionality. *Taylor I, supra*. "It is a well-settled rule that statements concerning a principle of law not essential to the determination of the case are obiter dictum and lack the force of an adjudication." *Arco Industries Corp v American Motorists Insurance Co (On Second Remand, On Rehearing)*, 233 Mich App 143, 147; __ NW2d __ (1998). Because we affirmed the tribunal's decision without reaching the constitutional issue, our comments regarding the constitutionality of the act were not essential to the resolution of the case and therefore constituted obiter dictum.

Having established that our previous comments were obiter dictum, we conclude that res judicata does not apply to those statements. The doctrine of res judicata requires a determination on the merits; however, obiter dictum lacks the force of an adjudication and "is not precedent upon which the rights of parties should be determined." *Mitchell v Perkins*, 334 Mich 192, 207; 54 NW 2d 293 (1952); *Arco Industries, supra*, at 147. Because this Court's dictum in *Taylor I* could not, by definition, determine the merits of the constitutional issue, our decision in *Taylor I* was not res judicata as to that issue of law. Accordingly, we hold that the trial court erred when it applied the doctrine of res judicata to bar plaintiff's present declaratory action.[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] This Court's recognition of the tribunal's limited jurisdiction is consistent with our subsequent opinion in *Meadowbrook Village Associates v City of Auburn Hills*, 226 Mich App 594, 596; 574 NW2d 924 (1997), when we stated that "[t]he tribunal does not have jurisdiction over constitutional questions and does not possess authority to hold statutes invalid."

[2] Plaintiff's complaint incorrectly identifies Section 10 of the act as MCL 211.11; MSA 7.11.

[3] Furthermore, we note that even if an issue of law is litigated and determined by a final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded by res judicata if a new determination is warranted "in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." *Socialist Workers, supra*, at 584, quoting Restatement Judgments, 2d (Tentative Draft No 1, 1973), § 68.1, pp 170-171.